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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 17.

LOUISVILLE AND JEFFERSONVILLE FERRY COMPANY

vs.

COMMONWEALTH OF KENTUCKY.

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Attorney General of Kentucky,
For Defendant in Error.

D. W. SANDERS,
Of Counsel.

GEO. A. LOUD PUBLISHING HOUSE PRINT, FRANKFORT, KY.

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vs.

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The statement of facts in this case are given in the brief filed by counsel for plaintiff in error. As the statement is substantially correct, the same is accepted for the purposes of this trial.

The Constitution of Kentucky provides for the taxation of corporate property, like individual property. Section 174 of said instrument is in these words:

> "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises."

By section 4020, Kentucky Statutes, which became the law November 11, 1892, after the adoption of the State Constitution, it is provided:

"All real and personal estate within this State, and all personal estate of persons residing in this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

Provision is made in the same chapter (known as chapter 108, title "Revenue and Taxation") for the assessment and taxation of the intangible property or franchise value of the corporations that have, or exercise, any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service.

By section 4077, Kentucky Statutes, title "Revenue and Taxation," it is provided:

"Section 4077. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation, or association, also every other corporation, company, or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town, and taxing district where its franchise may be exercised. The Auditor, Treasurer, and Secretary of State are hereby constituted a Board of Valuation and Assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in section 4095 of this article. The place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where

more than one jurisdiction is entitled to a share of such tax, shall be determined by the Board of Valuation and Assessment, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be Chairman of said Board, and shall convene the same from time to time, as the business of the board may require."

By section 4078 it is provided:

"Section 4078. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies, and associations mentioned in the next preceding section, except banks and trust companies, whose statements shall be filed as hereinafter required by section 4092 of this article, shall, annually, between the 15th day of September and the 1st day of October, make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager or other chief officer or agent, in such form as the Auditor may prescribe, showing the following facts, viz.:

"The name and principal place of business of the corporation, company, or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the 15th day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments and incomes from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale; and such other facts as the Auditor may require."

Notice may be given to such corporations, and the board may hear evidence and change the valuation made under section 4083, Kentucky Statutes, title "Revenue and Taxation," which reads as follows:

> "Section 4083. It shall be the duty of the Auditor, immediately after fixing such values by said board, to notify the corporation of the fact; and all such corporations shall have thirty days from the time of receiving the notice to go before such board and ask a change of the valuation, and may introduce evidence, and the chairman of the board is hereby authorized to summon and swear witnesses, and after hearing such evidence, the board may change the valuation as it may deem proper, and the action of the board shall be final."

It was by virtue of the power and authority conferred upon the Board of Valuation and Assessment by the several sections of the Kentucky Statutes aforesaid that it proceeded to assess and fix the franchise value of the Louisville and Jeffersonville Ferry Company for the several years mentioned. That company is a corporation, created and organized under an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to incorporate the Louisville and Jeffersonville Ferry Company," approved March 16, 1869. Under its charter said company exercises special and exclusive privileges, not allowed by law to natural persons, and also performs certain public services.

The proceedings of the board in this case conform to the rule laid down by the Court of Appeals of Kentucky in the case of the Henderson Bridge Company vs. The Commonwealth, 99 Ky. Reports, page 623.

This, in effect, is no more than a tax upon the intangible property of the corporation.

The Louisville and Jeffersonville Ferry Company refused to pay the tax on its intangible property as fixed and declared by the Board of Valuation and Assessment.

The findings of that board were judicial in character, from which there was no appeal. It did appear on notice before

that board, and made its defense. It was said by the Court of Appeals of Kentucky in the case of the Henderson Bridge Company vs. The Commonwealth, supra:

> "It should be further said that the findings of this Board of Valuation and Assessment partook of a judicial nature. The defendant had its day in court. It did appear on notice before that board, and on evidence made its defense. And on this hearing that board rendered its decision in fixing the value of the franchise of the defendant, granted by authority of the State of Kentucky; and this finding, if not conclusive, is entitled to a very high degree of consideration and authority, and it should not be lightly set aside or disregarded by the courts unless the bond proceeded upon an erroneous principle or adopted an improper mode or manner of estimating the value of the franchise, or unless fraud is charged or shown to exist."

The plaintiff in error, being in default in the payment of its taxes on its intangible property or franchise as fixed by the Board of Valuation and Assessment, the Commonwealth of Kentucky instituted these several actions on the 27th day of August, 1898, in the Franklin Circuit Court, to recover the taxes and the penalties denounced by law. Judgments were rendered in favor of the plaintiff for the taxes due in each of said years, and that judgment was affirmed by the Court of Appeals of Kentucky.

The opinion of the Court of Appeals was rendered by Judge Paynter, and is as follows:

> "The judgments from which the appeals are prosecuted are for the franchise tax for the years of 1894, 1895, 1896, 1897 and 1898. The appellant is a corporation organized under a special act of the Legislature, passed in 1869. It purchased a ferry franchise which had been originally granted by the territorial authorities of Indiana, which authorized the original grantee to conduct a ferry business across the Ohio river from Indiana to Kentucky. By regular devolution of title, through descents and conveyances, appellant owns the rights thus granted. The franchise thus acquired authorizes the appellant to transport

persons and property from Jeffersonville, Ind., to Louisville, Ky. There was vested in the sinking fund commissioners of the city of Louisville title to the ferry rights along the Ohio river within the boundaries of that city, and by an agreement with them the appellant became the owner of it. The appellant owned certain ferry boats which are enrolled at the port of Louisville. It owned certain real estate in the State of Indiana. It has paid its taxes upon its real property in Indiana and upon its personal property in this State. It has paid its taxes only upon its tangible property. It appears to have no income except the revenue derived from carrying persons and property from one side of the river to the other. The Board of Valuation and Assessment fixed the value of the franchise for the corporation as if it conducted all of its business in the territorial limits of the State of Kentucky, not deducting anything from that value on account of the fact that it exercised the privilege of conveying passengers from Jeffersonville to Louisville by reason of its acquisition of privileges which were originally granted under the laws of that State.

"On behalf of appellant it is urged, first, that the franchise belonging to the corporation, derived by it from the State of Indiana, is an incorporeal hereditament, whose location is in the State of Indiana, and which can not be taxed by the State of Kentucky, nor can its value be included in any tax in which the State of Kentucky endeavors to exact from it; second, that as the revenues of the corporation are derived from the exercise of two independent franchises, one having its source from the State of Kentucky and the other having its source from the State of Indiana, only so much of the value assessed as comes from the exercise of the Kentucky franchise can be taxed; third, that as the franchise of the corporation is solely employed in the business of interstate commerce, the revenues from the exercise of that franchise are not subject to State taxation, nor can they be made the basis of an assessment for the purpose of State taxation; fourth, that the assessments not having been made within the years during which the taxes were due and payable, the Board of Valuation and Assessment could not make the

assessment, in other words, has no right to retrospectively assess.

"We will consider the first and second objections together. We deem it unnecessary to enter into a consideration as to the meaning of the eleventh article of the compact with Virginia. It is sufficient to say that in Newport, &c. vs. Taylor's Ex'ors, 16 Ben Mon., 784, and Reeves vs. Little, 7 Bush, 469, this court has held that the State of Kentucky has the right to grant a ferry franchise for the transportation of persons and property to the States on the northern side of the Ohio river, and that she has never attempted to exercise the right to grant a ferry franchise for the transportation of persons or property from northern shore of the Ohio river to the Kentucky shore, but the statutes of Kentucky only attempted to regulate the transportation of persons and property from this State's northern boundary to the opposite shore of the Ohio river. From our view of the question here involved it is unnecessary to enter into a consideration of the question as to the right which the State of Kentucky might exercise in the matter of regulating transportation of persons and property across the Ohio river from its northern to its southern shore. The appellant is a Kentucky corporation. The Board of Valuation and Assessment did not attempt to assess or tax its revenues coming from the exercise of its franchise in the transportation of persons and property over the Ohio river. But under certain sections of the Kentucky Statutes it assessed the value of appellant's franchise, which is its intangible property. The board did not assess, or attempt to assess, the property, either tangible or intangible, which it owned in the State of Indiana.

"By virtue of its corporate authority the appellant acquired ferry boats, the ferry rights within the city of Louisville, which included the right to transport persons and property from Kentucky to Indiana over the Ohio river, and the necessary use of its wharf to carry on that business. It also, by contract (which its charter seems to have authorized it to do), acquired wharf privileges on the Indiana side, and also the right which had been previously granted by Indiana to transport persons and property from

Indiana to Kentucky over the Ohio river. It also owns a park in Indiana. The property thus acquired constituted all of its property, tangible and intangible, in Kentucky and Indiana. Having thus acquired the foreging property, and having profitably used it, its corporate franchise presumably became of the value fixed by the Board of Valuation and Assessment. If the franchise of the appellant became valuable by the acquisition of tangible or intangible property, or both, the effect is exactly the same, whether it is acquired in Indiana or in Kentucky, or both. It is not the tangible or intangible property in Indiana which the appellant acquired by purchase which is sought to be taxed, but the value of its franchise which has been created in, and now exists in, Kentucky.

"We do not think the case of Henderson Bridge Co. vs. Commonwealth, 99 Ky., 623, is in conflict with the views here expressed. There the Commonwealth only attempted to tax its franchise to low-water mark on the Indiana side. This was done because that part of the bridge which was in the State of Indiana was constructed under a charter from the State of Indiana, and presumably held and operated by virtue of it.

"There is no doubt but what the business which the appellant carries on may be properly designated as interstate commerce, and that it is a subject of national character, Congress having the authority and the power under the Constitution to regulate it. The State of Kentucky is not attempting to impose a tax upon receiving and handling persons and property, but is simply attempting to collect a franchise tax on the corporation created by law. As authorized by the laws and Constitution, the State is entitled to impose a tax upon its tangible property.

"The Supreme Court, in Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 208, said: 'It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to State taxation, provided always it be within the jurisdiction of the State.'

"In Morgan vs. Parham, 16 Wall, 471, it was held that a vessel registered in New York was not subject to taxation in Alabama, though engaged in commerce as one of a

regular line of steamers between Mobile, in that State, and New Orleans, in Louisiana. In that case the court said: 'It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that State, but was there temporarily only, and that it was engaged in lawful commerce between the States, with its situs at the home port of New York, where it belonged, and where its owner was liable to be taxed for its value.'

"If the State was attempting to impose a tax upon the gross receipts or revenues of the appellant it might be plausibly argued that it was a tax imposed upon interstate commerce, for it was held in Philadelphia & Southern Steamship Co. vs. Pennsylvania, 122 U. S., 326, that a State tax upon the gross receipts of the steamship company incorporated under its laws, which are derived from the transportation of persons and property by sea, between different States, is a regulation of interstate commerce, in conflict with the exclusive powers of Congress under the Constitution, but the court (345) said: 'The corporate franchises, the property, the business, the income of corporations created by a State, may undoubtedly be taxed by the State; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government.'

"In Henderson Bridge Co. vs. Kentucky, 166 U. S., 154, the court said: 'The fact that the tax in question was to some extent affected by the amount of the tolls received, and, therefore, might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the *business transacted.*' This very question was decided in Erie Railroad v. Pennsylvania, 158 U. S., 431-439, where it was said: 'It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burden on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be an interference with interstate commerce. The interference with the commercial power must be direct, and

not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance.'

"The appellant is domiciled in Kentucky, and the property sought to be taxed has its situs in Kentucky, and, as we have said, there is no attempt to tax the appellant's business, income or revenues, but its income is alone considered in fixing the value of its franchise. The Board of Valuation and Assessment has the right to make retrospective assessments. Section 4090, Kentucky Statutes, reads as follows: 'Should any corporation fail to make the report, as required herein, on or before the 1st day of October of each year, the said board shall proceed to ascertain the facts and values, as required by this article, in such manner and by such means as it deems proper, at the cost of the company failing to make the report, and shall fix the values of the corporate franchise liable for taxation as aforesaid, and the corporation shall be taxed accordingly.' By this section, if the reports are not made within the time prescribed by law, the board may proceed to ascertain the facts and values as required by the article, and, in our opinion, it was intended by this section that they should exercise this power at any time. Besides, section 4077 provides that the Auditor may call the Board of Valuation and Assessment together from time to time, as the business of the board may require. This indicates that they may have meetings at any time to discharge the duty imposed upon them by law, among which is the duty of assessing franchises when no reports are made. Section 4241 imposes a duty upon the sheriff and auditor's agent, but does not interfere with the power of the board to make the assessments as in this case. If they fail to do so, and the sheriff and auditor's agent should attempt to have the assessment made, then the question *would arise* as to their authority to do so. Until such question arises we forbear to express an opinion on it.

"The judgments are affirmed."

From this judgment the ferry company has prosecuted this writ of error, and has assigned the following errors:

ASSIGNMENT OF ERRORS.

"1. The said Court of Appeals of Kentucky erred in deciding that the Board of Valuation and Assessment had the right to consider as part of the property, or as entering into the value of the franchise of the plaintiff in error, its right and franchise to operate a ferry from the State of Indiana to the State of Kentucky.

"2. The Court of Appeals of Kentucky erred in deciding that the law under which the Board of Valuation and Assessment acted authorized it to take into consideration, in fixing the value of the capital stock of the plaintiff in error, the franchise which has been conveyed to it, and which it owned, for operating a ferry from the State of Indiana to the State of Kentucky.

"3. The said Court of Appeals of Kentucky erred in deciding that the Board of Valuation and Assessment had the right, in fixing the value of the capital stock of the plaintiff, or the value of the franchise of the plaintiff, to consider the earnings made by it in transporting persons and property from Kentucky to Indiana and from Indiana to Kentucky, the same being interstate commerce.

"4. The Court of Appeals of Kentucky erred in deciding that the Board of Valuation and Assessment did not, in fixing the assessment of the plaintiff in error, violate the Constitution of the United States, particularly that clause thereof conferring upon Congress the right to regulate commerce between the States.

"5. The Court of Appeals of Kentucky erred in deciding that the Board of Valuation and Assessment, in fixing the assessment of the plaintiff in error, did not violate the Constitution of the United States, and particularly the *fourteenth amendment thereof, and did not deprive* the plaintiff in error of its property without due process of law."

ARGUMENT.

It is urged that the value of the franchise to operate a ferry from the State of Indiana to the State of Kentucky should not have been considered in fixing the value of the franchise of the Kentucky corporation.

In the 7th section of the act incorporating the ferry company (see the Act in the Appendix to brief of counsel for plaintiff in error) it is provided:

> "Said corporation may purchase from any existing ferry companies or associations any ferry boats, wharves, and ferry franchises for any ferry or ferries, between Louisville and Jeffersonville, and upon the purchase of all such existing franchises shall have the right to carry on and conduct a ferry or ferries between said cities."

By section 8 of said Act it is also provided:

> "Said corporation may accept such boats and franchises, and wharves and other property in payment of stock subscribed, and at such price as may be agreed upon."

It is admitted that the ferry right on the Indiana shore, by a regular chain of title, passed to certain persons, who operated the ferry and used the ferry privileges as partners; that these parties conveyed their rights to the Kentucky corporation in payment for stock subscribed; that the corporation, in the year 1887, made a contract with the city of Louisville by which it secured a lease of the ferry privileges to operate the ferry and use said privileges so far as the State of Kentucky had legal authority to confer—the right having been vested by law in the said city. In this way the corporation secured control of each ferry right, the one leading from Kentucky to the south bank of the Indiana shore, and the other from Indiana to the north bank of the Kentucky shore, within the city limits.

It is admitted that the Court of *Appeals of Kentucky* in the case of the City of Newport vs. Taylor's Executors, 16 B. M., 700, held that the granting of a ferry franchise across the Ohio river only provided for crossing from the Kentucky shore to a landing in the State upon the other side of the river, and did not authorize a franchise or ferry privilege from such State to the Kentucky shore.

This principle was also announced in the case of Reeves vs. Little, 7 Bush, 470; and the first-named case seems to have

been upheld by this court under the name of Conway vs. Taylor's Executors, 1 Black., 603.

Our contention is that the two rights are now merged or united, forming a legal entity, known as the Louisville and Jeffersonville Ferry Company, incorporated under the laws of Kentucky, and having its situs within her sovereignty. It is not material in fixing the franchise value to determine whether the ferry right originally granted by the State of Indiana is an incorporeal hereditament. The Commonwealth of Kentucky is not seeking to impose any tax upon the tangible property of the company located in Indiana, whether it be realty or personal property. That property has been listed and the taxes paid to the proper collecting officers of Indiana. The tangible property in Kentucky, consisting of the ferry boats and equipments, are listed for taxation with the Assessor of Jefferson county, Kentucky.

It is a tax upon the net earnings of the corporation, now legally authorized to use these ferry rights, which has been ascertained and valued by the board created for that purpose, that the Commonwealth of Kentucky is seeking to recover.

The owners of the ferry right leading from the State of Indiana to the Kentucky shore have transferred that right to the Kentucky corporation, and in return have secured certain shares of its capital stock. As holders of this stock they enjoy the profits of both ferry rights, now united and under one management, having its legal situs in this State. They pay no franchise tax to the State of Indiana. This case is unlike the Henderson Bridge Company, as that corporation had secured charters from both States. The power to operate the bridge under the Kentucky charter extended to low-water mark on the Indiana *side*; *beyond that point the property was* owned and controlled by the Indiana corporation. It necessarily and logically followed, that the franchise value extended no further than the low-water mark on the Indiana shore.

In this case, the ferry right granted by the State of Indiana was owned by *individuals*, who operated the ferry as partners. They voluntarily transferred their ferry privileges to the Kentucky corporation, and are stockholders, sharing in the net

profits arising from its business. It is the value of the franchise contained in its charter which is the subject of taxation. The State of Kentucky, under its tax laws, is not seeking to impose a tax upon the ferry privilege, as such, granted by the State of Indiana, but it is the franchise of the corporation created by Kentucky laws, and having its situs within her jurisdiction, that the Commonwealth of Kentucky claims the right to tax, and thereby compel this corporation to discharge its just proportion of the burdens of taxation in return for protection given and special privileges conferred.

Mr. Justice Field, in delivering the opinion of the Supreme Court in Gloucester Ferry Company vs. Pennsylvania, 114 U. S., 206, said:

> "It is true that property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to State taxation, provided always it be within the jurisdiction of the State. As said by Chief Justice Marshall in McCulloch vs. Maryland (4 Wheaton, 316-329), 'All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation.' This proposition may almost be pronounced self-evident."

There is no attempt to tax property having a situs outside of the State, but only to place a just value on the property within its jurisdiction.

II.

It is insisted that this is a tax upon interstate commerce because the *ferry company* operates a ferry, carrying freight and passengers between Louisville, Kentucky, and Jeffersonville, Indiana.

In the dissenting opinion of Mr. Justice White, in the case of Adams Express Co. v. Ohio, 165 U. S., 165, is a full examination of the cases on this point.

In the opinion of the court in the same case, by Mr. Chief Justice Fuller, this language was used, namely:

"The principal contention is that the rule contravenes the commerce clause, because the assessments, while purporting to be on the property of complainants within the State, are in fact levied on their business, which is largely interstate commerce.

"Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, can not be directly subjected to State taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of government under whose protection they conduct their operations, and taxation on property, collectible by the ordinary means, does not affect interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of the government."

The ownership of these ferry rights is more than a unity of ownership; it is a unity of use for convenience and profit, and from the nature of the business as authorized by the charter. It is not proposed to tax the gross receipts of the ferry company or persons or property transported across the river either way. The corporation has secured a special privilege by its charter, without which it could not have acquired the ownership of the ferry privilege in the State of Indiana. It is only a tax upon the property within the State of Kentucky, and is not an interference with interstate commerce.

III.

It is also assigned as error by plaintiff in error that the franchise of the ferry company and the imposition of this tax is in violation of the fourteenth amendment of the Constitution of the United States.

It is too late to say that these provisions and remedies do not constitute due process of law.

The statutes make provision for statements, notice, hearing, review and correction of errors or excessive valuations. The proceedings are of a judicial nature. The Court of Appeals of Kentucky has sustained the validity of the law and the proceedings, and the decision of the State Court will ordinarily be accepted as controlling the question. (Adams Express Co. vs. Ohio, 166 U. S., 219; Henderson Bridge Company vs. Kentucky, 166 U. S., 153; Hagar vs. Reclamation District, 111 U. S., 710.)

We submit that the judgment of the court below should be affirmed.

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Of Counsel.